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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JORGE GUADARRAMA,  
12 CDCR #P-54739,

13 Plaintiff,

14 vs.  
15

16 MATTHEW CATE, Secretary;  
17 LARRY SMALL, Warden;  
18 DOES 1-10,

19 Defendants.  
20

Civil No. 09-2440 JM (WVG)

**ORDER DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
AS BARRED BY 28 U.S.C. § 1915(g)  
[Doc. No. 2]**

**AND**

**DISMISSING CIVIL ACTION  
WITHOUT PREJUDICE FOR  
FAILURE TO PAY CIVIL  
FILING FEES MANDATED  
BY 28 U.S.C. § 1914(a)**

21 Plaintiff, an inmate currently incarcerated at Calipatria State Prison (“CAL”) and  
22 proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims  
23 the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”), CAL  
24 Warden Small and other unidentified CDCR and CAL officials have violated his Fourteenth  
25 Amendment right to due process by imprisoning him beyond his earliest possible release date.  
26 (Compl. at 2-3, 8, 13.)

27 In addition, Plaintiff has submitted a Motion to Proceed *In Forma Pauperis* (“IFP”)  
28 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

## I.

## MOTION TO PROCEED IFP

Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2). However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege to proceed IFP:

. . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief can be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (Under the PLRA, “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP status under the three strikes rule[.]”). The objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

“‘Strikes’ are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed ‘on the ground that [they were] frivolous, malicious, or fail[ed] to state a claim.’” *Andrews*, 398 F.3d at 1116 n.1. Thus, once a prisoner has accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other action IFP in federal court unless he is under “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time of filing.”).<sup>1</sup>

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<sup>1</sup> The Ninth Circuit has held that section 1915(g) does not violate a prisoner’s right to access to the courts, due process or equal protection; nor does it violate separation of powers principles or operate as an ex post facto law. *Rodriguez v. Cook*, 169 F.3d 1176, 1179-82 (9th Cir. 1999); see also

1 While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his  
 2 request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district court docket  
 3 records may be sufficient to show that a prior dismissal satisfies at least one of the criteria under  
 4 § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When applying 28 U.S.C. § 1915(g),  
 5 however, the court must “conduct a careful evaluation of the order dismissing an action, and  
 6 other relevant information,” before determining that the action “was dismissed because it was  
 7 frivolous, malicious or failed to state a claim,” since “not all unsuccessful cases qualify as a  
 8 strike under § 1915(g).” *Id.* at 1121.

9 The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief may be  
 10 granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of Civil Procedure  
 11 12(b)(6).’” *Id.* at 1121 (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)).  
 12 *Andrews* further holds that a case is “frivolous” for purposes of § 1915(g) “if it is of little weight  
 13 or importance” or “ha[s] no basis in law or fact.” 398 F.3d at 1121 (citations omitted); *see also*  
 14 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both factual  
 15 allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an  
 16 arguable basis in either law or in fact .... [The] term ‘frivolous,’ when applied to a complaint,  
 17 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.”). “A  
 18 case is malicious if it was filed with the intention or desire to harm another.” *Andrews*, 398 F.3d  
 19 at 1121 (quotation and citation omitted).

## 20 II.

### 21 APPLICATION OF 28 U.S.C. § 1915(g)

22 The Court has carefully reviewed Plaintiff’s Complaint and has ascertained that it makes  
 23 no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger of serious physical injury’  
 24 at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). Therefore,  
 25 Plaintiff may be barred from proceeding IFP in this action if he has on three prior occasions had  
 26 civil actions or appeals dismissed as frivolous, malicious or for failing to state a claim. *See* 28

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27  
 28 *Andrews*, 398 F.3d at 1123 (noting constitutionality of § 1915(g), but recognizing that “serious constitutional concerns would arise if § 1915(g) were applied to preclude those prisoners who had filed actions who were not ‘frivolous, malicious, or fail[ing] to state a claim’ from proceeding IFP.”).

1 U.S.C. § 1915(g).

2 A court “‘may take notice of proceedings in other courts, both within and without the  
3 federal judicial system, if those proceedings have a direct relation to matters at issue.’” *Bias v.*  
4 *Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
5 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*  
6 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

7 Here, the Court takes judicial notice that Plaintiff Jorge Guadarrama, CDCR Inmate #P-  
8 54739, has had three prior prisoner civil actions dismissed in the Southern District of California  
9 on grounds that they were frivolous, malicious, or failed to state a claim upon which relief may  
10 be granted. They are:

- 11 1) *Guadarrama v. State of California, et al.*, Civil Case No. 08-0078 MMA (AJB),  
12 (S.D. Cal. Aug. 24, 2009) Report and Recommendation (“R&R”) to Dismiss  
13 Amended Complaint for failing to state a claim pursuant to FED.R.CIV.P. 12(b)(6)  
14 [Doc. No. 44]); (S.D. Cal. Sept. 14, 2009 Order Adopting R&R [Doc. No. 49]);  
15 and (S.D. Cal. Oct. 15, 2009 Order of USCA Granting Plaintiff’s Motion for  
16 Voluntary Dismissal of Appeal, No. 09-56601 [Doc. No. 58]) (strike one);
- 17 2) *Guadarrama v. Tilton, et al.*, Civil Case No. 08-1158 MMA (CAB) (S.D. Cal.  
18 Nov. 5, 2008 Order Dismissing First Amended Complaint for failing to state a  
19 claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)) [Doc. No. 12]); (S.D.  
20 Cal. May 22, 2008 Order of Dismissal [Doc. No. 25]); (S.D. Cal. May 28, 2009  
21 Mandate of USCA dismissing appeal No. 09-55467 [Doc. No. 27], *cert. denied*  
22 U.S. Supreme Court No. 09-5874 (Oct. 28, 2009) (strike two); and
- 23 3) *Guadarrama v. Cate, et al.*, Civil Case No. 08-2286 BTM (CAB) (S.D. Cal. Feb.  
24 11, 2009 Order Dismissing First Amended Complaint for failing to state a claim  
25 pursuant to 28 U.S.C. § 1915(e)(2)(B) & 1915A(b)(1) [Doc. No. 6]); (S.D. Cal.  
26 July 17, 2009 Order re Entry of Judgment [Doc. No. 14]); Order of USCA  
27 Dismissing Appeal, No. 09-55447 [Doc. No. 16]) (strike three).

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Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he is under imminent danger of serious physical injury, he is not entitled to the privilege of proceeding IFP in this action. *See Andrews v. Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

### III.

#### CONCLUSION AND ORDER


For the reasons set forth above, the Court hereby **DENIES** Plaintiff’s Motion to Proceed *In Forma Pauperis* as barred by 28 U.S.C. § 1915(g) [Doc. No. 2], and **DISMISSES** this action without prejudice pursuant to 28 U.S.C. § 1914(a) for failing to prepay the \$350 filing fee. Plaintiff may no longer proceed IFP in any federal district or appellate court pursuant to 28 U.S.C. § 1915(a) while he is incarcerated unless he is in “imminent danger of serious physical injury.” *See* 28 U.S.C. § 1915(g).

Further, this Court **CERTIFIES** that any IFP appeal from this Order would not be taken “in good faith” pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

The Clerk shall close the file.

**IT IS SO ORDERED.**

DATED: December 9, 2009

  
 Hon. Jeffrey T. Miller  
 United States District Judge